

**IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
BECKLEY**

UNITED STATES OF AMERICA

v.

CRIMINAL NO. 5:14-00244

DONALD L. BLANKENSHIP

**UNITED STATES' MOTION FOR ADDITIONAL *ALLEN*
CHARGE BEFORE CONSIDERING MISTRIAL**

The United States moves that, in the event the jury again states it is deadlocked, the Court give a second *Allen* charge before considering a mistrial. At the moment, of course, the jury continues to deliberate, and it may well reach a verdict that renders this motion superfluous. The United States nonetheless submits the motion now to give the Court sufficient time to consider it should it ripen.

A trial court has discretion to give a second *Allen* charge if circumstances warrant. *United States v. Cornell*, 780 F.3d 616, 625-27 (4th Cir. 2015); *United States v. Seeright*, 978 F.2d 842, 850 (4th Cir. 1992). The Fourth Circuit affirmed this principle earlier this year. *Cornell*, 780 F.3d at 625-27. In exercising that discretion here, the Court must consider whether, under all the circumstances of this case, the giving of a second charge would be coercive. *Id.* at 626-27. It would not be, for several reasons.

First, the jury's behavior these past two months shows coercion is unlikely. As the Court observed, the jury has demonstrated exemplary patience, attentiveness, and seriousness of mind. It is evident that the jury regards its duty soberly, and a properly balanced *Allen* charge would not sway it either way.

Second, the jury has not yet said it cannot make further progress. There have been two notes about the jury's lack of agreement thus far, and both have asked the Court for direction on how to go forward. Early on, the November 19 note asked, "How long do we deliberate?" The December 1 note sought further direction more expressly, asking, "Do you have any further instructions as to what we should do?" Even after several days of deliberation, the jury thus holds open the prospect of progress and invites the Court to assist it in reaching a verdict. A second *Allen* charge will not coerce a jury that has taken such a responsible and deliberate approach to its work.

Third, the length of deliberations, even after a second *Allen* charge, will not be disproportionate to the amount of evidence the jury has seen and heard or the length of that evidence's presentation. If the case had lasted only a day or two, a second *Allen* charge after more than seven days' deliberations might be taken as an order to reach a verdict no matter what. The situation here differs greatly. Even if another deadlock note is received after further deliberation, directing the jury to continue deliberating would not be a disproportionate step in light of the evidence presented. This maintenance of proportionality further minimizes any possibility of coercion.

Accordingly, the United States moves the Court, in the event of another statement of deadlock, to give the instruction attached as an exhibit hereto.

Respectfully submitted,

R. BOOTH GOODWIN II
United States Attorney

/s/ Steven R. Ruby
STEVEN R. RUBY, WV Bar No. 10752
Assistant United States Attorney
300 Virginia Street, East

Room 4000
Charleston, WV 25301
Telephone: 304-345-2200
Fax: 304-347-5104
Email: steven.ruby@usdoj.gov

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing “United States’ Motion for Additional *Allen* Charge Before Considering Mistrial,” has been electronically filed and service has been made on opposing counsel by virtue of such electronic filing this 2nd day of December, 2015 to:

Steven Herman, Esq.
Miles Clark, Esq.
Eric Delinsky, Esq.
William Taylor, III, Esq.
Blair Brown, Esq.
Zuckerman Spaeder LLP
Suite 1000
1800 M Street, NW
Washington, DC 20036

Alex Macia, Esq.
Spilman Thomas & Battle PLLC
P.O. Box 273
Charleston, WV 25321

James Walls, Esq.
Spilman Thomas & Battle PLLC
P.O. Box 615
Morgantown, WV 26507

/s/ Steven R. Ruby
STEVEN R. RUBY, WV Bar No. 10752
Assistant United States Attorney
300 Virginia Street, East
Room 4000
Charleston, WV 25301
Telephone: 304-345-2200
Fax: 304-347-5104
Email: steven.ruby@usdoj.gov